(1)

84-1503

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, AND ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, AND GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, AND BEVERLY F. UNDERWOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH M. JACOBS
CHARLES ORLOVE (Counsel of Record)
NANCY E. TRIPP
JACOBS, BURNS, SUGARMAN & ORLOVE
201 North Wells St., Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646

LAWRENCE A. POLTROCK
WAYNE B. GIAMPIETRO
DE JONG, POLTROCK & GIAMPIETRO
221 N. LaSalle St., Suite 2600
Chicago, Illinois 60601

Dated: January 23, 1985

26 pp

QUESTIONS PRESENTED

The court below held that a public employee who is represented by an exclusive bargaining representative and who objects to providing financial support to that representative is deprived of liberty without due process where an employer, acting pursuant to state law, deducts from the individual's pay an amount equal to the proportion of union dues that the union has determined it expends on collective bargaining and contract administration and where the union places that money in escrow pending an arbitrator's or state court's review of the union's determination. The questions presented by this decision are:

1. Is the court of appeals' holding contrary to this court's summary decisions in *Jibson v. White Cloud Education Association,* U.S. , 105 S.Ct. 236 (1984) and *Kempner v. Local 2077,* U.S. 105 S.Ct. 316 (1984), both of which issued after the decision below?

2. Is the court of appeals' definition of the liberty interest of objecting agency fee payers and that court's delineation of the procedural requirements imposed by the Constitution on states that permit agency shop agreements contrary to this Court's opinions interpreting the Due Process Clause and, in particular, its opinions in the line of cases from *Railway Employees Department v. Hanson,* 351 U.S. 225 (1956) to *Ellis v. Railway Clerks,* U.S. , 104 S.Ct. 1883 (1984)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, AND ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, AND GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MC COY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, AND BEVERLY F. UNDERWOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, and Robert M. Healey, Jacqueline B. Vaughn, Rochelle D. Hart, Thomas H. Reece, and Glendis Hambrick hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in

Hudson, et al v. Chicago Teachers Union, Local No. 1, et al., 743 F.2d 1187 (7th Cir. No. 83-3118; September 6, 1984).

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 573 F.Supp. 1505 and is reprinted at pages A-24-57 in a separately bound Appendix to this Petition (hereinafter "App."). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 and is reprinted at App. A-1-21.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 6, 1984. App. A-22. A timely petition for rehearing *en banc* was denied on October 24, 1984. App. A-23. On January 14, 1985, Justice Stevens signed an order extending the time for filing a petition for writ of certiorari to and including March 23, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes, ch. 122, § 10-22.40(a) (1983) provides:

> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Chicago Teachers Union Local No. 1 ("CTU") serves as the exclusive representative for a bargaining unit of 27,500 employees comprised of teachers and of other educational workers employed by the Board of Education of the City of Chicago ("the Board"). App. A-1, -26.

During the period 1967 through November 1982, every employee in the bargaining unit received all the benefits of the collective bargaining agreement which CTU negotiated with, and enforced against, the Board, but not every such employee elected to join CTU or to finance its activities on behalf of the employee group. App. A-25-26. Effective August 1, 1981, the Illinois legislature enacted a statute providing (at all times relevant here) that a collective bargaining agreement covering public school employees may contain "a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members"; these "proportionate share payments shall be deducted by the Board from the earnings of the non-member employees and paid to the representative organization." Ill. Rev. Stat. ch. 122, § 10-22.40a(1983). App. A-26-27.[1]

---

[1] Effective July 1, 1984, the Illinois statute quoted in text was superceded by the Illinois Education Labor Relations Act, Ill. Stat. Ann. ch. 48, § 1701, *et seq.* (Smith-Hurd 1984 Supp.). That law authorizes the deduction from non-members' earnings of a "fair share fee for services rendered . . . not to exceed the dues uniformly required of members" and "not [to] include any fees for contributions related to the election or support of any candidate for political office." *Id.*, § 1711. Under that provision, the "exclusive representative shall certify to the employer . . . each non-member's fair share fee" and that fee "shall be deducted by the employer from the earnings of the non-member employees and paid to the exclusive representative." *Id.*

Pursuant to this statutory authority, in the collective bargaining agreement that became effective September 1, 1982, CTU and the Board agreed to a provision, paralleling the Illinois law, for the deduction of "proportionate share payments" from the earnings of bargaining unit employees who are not members of CTU. App. A-27.[2]

Following the negotiation of the contract, CTU reviewed its account ledgers and other records for the immediately prior fiscal year to determine what proportion of its income had been expended for purposes chargeable to nonmembers under the statute. Subtracting expenditures for benefits conditioned upon membership and expenditures for political,[3] ideological, charitable and philanthropic causes not related to bargaining, CTU determined that 4.6% of its income in the prior year had been expended on matters not germane to collective bargaining. To provide a margin for mathematical miscalculation or oversights, CTU decided to provide an advance reduction in union dues of 5% for non-members, yielding a monthly charge of $16.48 for non-member teachers, and $11.54 for non-members employed in the bargaining unit in other capacities. App. A-29. CTU's president submitted a sworn affidavit to the School Board reporting on the calculations CTU had made and requesting the School Board to commence deducting proportionate share payments from non-members' earnings, *Id.* In December, 1982, the Board began to do so. App. A-30.

Before the first deductions actually were made, CTU established an appeals procedure to adjudicate objections non-

[2] A "proportionate share payment" is referred to in other jurisdictions as a "fair share fee," a "service fee" or an "agency shop fee". We use the term "proportionate share payment" in this petition because that is the term contained in the Illinois law.

[3] In 1981-82 the CTU had established a separate CTU-PAC, funded by voluntary contributions, from which political contributions were thereafter made. R. 58: Tr. 63, 100-102. Thus the only political expenditures from the general fund were such incidental costs as clerical wages for preparing mailings, postage, and phone banks.

members might raise "concerning the existence and/or propriety of expenditures included in the proportionate share payments." App. A-28. That appeals procedure begins with an internal union review and culminates in a decision by an impartial arbitrator, accredited by a national arbitration organization and appointed by the CTU president from a list maintained by the Illinois State Board of Education pursuant to Ill. Rev. Stat. ch. 122, §§ 24-12 and 34-15 (1983) for adjudication of tenured teacher dismissals. In addition, the Illinois courts under their general "jurisdiction to adjudicate all controversies," *Lupin v. Cullerton*, 46 Ill. App.3d 387, 361 N.E.2d 6 (1977), *see also Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), were open to any non-member who believed that he/she was being charged for expenses that are not part of the cost of "the collective bargaining process and contract administration," in violation of the statute.[4]

The seven respondents in this case were at all times relevant here employed in the bargaining unit represented by CTU and were not members of CTU. App. A-30. In November, 1982—before deductions had been made from any non-member's earnings—two of the respondents wrote identically worded letters to CTU claiming a constitutional and statutory right to be free from paying any money to the Union other than an amount equal to the pro rata amount of expenditures germane to collective bargaining, contract administration, and grievance adjustment. App. A-30-31. In December, 1982, after deductions began, a third respondent sent an identical letter to CTU. *Id.*[5]

[4] Whether the Illinois state court, as a matter of state law, would have required exhaustion of the union remedies before adjudicating an objector's claim is uncertain, as no objector sued in state court.

[5] In January, 1983, a fourth respondent wrote to CTU objecting to the deduction of any money and requesting the return of all sums that had been deducted. CTU responded to this letter in the same manner as it responded to the other letters described in text. App. A-31.

None of the remaining three respondents notified CTU that he/she objected to the proportionate share payments. App. A-30. The district

The Union responded to these letters with a form letter explaining the legal basis for proportionate share fees and the manner in which the fees had been calculated by CTU, and describing the internal appeals procedure CTU had established; the letter stated that "[a]ny objection you may file will be recognized and processed in full compliance with the prescribed procedures . . ." App. A-31.

None of the respondents submitted an objection or otherwise pursued CTU's internal procedure in response to the Union's letter, nor did any respondents sue in state court to challenge the amount of the deduction under the Illinois law.[6] Instead, in March 1983, respondents commenced this action in federal court against the Board and CTU alleging that the deduction by the Board of fair share payments in the amount of 95% of union dues deprived respondents of freedom of expression and association and of due process of law. Prior to argument before the court of appeals, CTU voluntarily determined to place the entire proportionate share fees of those who had perfected an objection in an interest-bearing escrow account to be held in that account until a determination is made as to the appropriate amount of the payment to which the union is entitled. App. A-14.

Proceedings Below

In the district court, respondents challenged both the procedures that had been followed to determine the amount of the

court concluded that these three respondents—and the two respondents who had "objected" to the fee before the amount was set—were not entitled to any relief as they had not protested the fee to CTU. App. A-33. The court of appeals did not treat with that ruling.

[6] Respondent Hudson did write a second letter to CTU requesting "a full disclosure of the union's financial operations and a step-by-step explanation of how the non-member portion of the dues was gotten." CTU responded to this letter by inviting Hudson to come to CTU's offices for an "informational conference" and/or to inspect CTU's records. Hudson did neither. App. 32.

proportionate share payment and also the substance of that determination, *i.e.* the amount of the deduction. App. A-25, -35, -36, -41. The district court found the statute constitutional on its face and as applied. App. A-56. On appeal, respondents elected to "make almost their whole attack on the procedure for determining how much shall be deducted." App. A-3. Thus, as the appellate court stated, the question that was posed by respondents was whether they

> have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution. [App. A-4-5.]

The appellate court answered that question in the affirmative, holding the "procedure that the defendants adopted in this case is constitutionally inadequate, and they must go back to the drawing board." App. A-12. That court ruled that it is not constitutionally sufficient for the union, before assessing proportionate share payments, to make an advance reduction of dues based upon its calculation of the portion of its income expended on matters not related to collective bargaining and to place an objector's fee in escrow. App. A-12-15. Rather, the court of appeals held that a public employer may only deduct proportionate share payments if it "establish[es] a procedure that will make reasonably sure that the wages of non-union employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." App. A-9. Specifically that court mandated the following:

> Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some

> other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. [App. A-12-13.]

And the court of appeals emphasized that the burden was on "the Board, pursuant to our decision, [to] create[] such procedures." App. A-6, 9.

REASONS FOR GRANTING THE WRIT

The decision below is flatly contrary to two summary decisions of this Court—both within this very Term—each of which sustained the constitutionality of procedures for effecting proportionate share payments which procedures were less exacting than those the appellate court here held to be unconstitutional. *Jibson v. White Cloud Education Ass'n,* U.S. , 105 S.Ct. 236 (1984); *Kempner v. Dearborn Local 2077,* U.S. , 105 S.Ct. 316 (1984). This Court's decisions in *Jibson* and in *Kempner* did not issue until after the opinion below issued; petitioners attempted to call those decisions to the lower court's attention in a motion for reconsideration of the denial of rehearing, but the court below refused to allow that motion to be filed. See p. 14, *infra*. By so doing, that court allowed its decision to stand notwithstanding the conflict between its decision on the one hand and *Jibson* and *Kempner* on the other and without even confronting that conflict. The decision below thus should be vacated as inconsistent with *Jibson* and *Kempner* and with the decisions of this Court on which those summary decisions rest.

Alternatively, the decision below should be subjected to plenary review because of the conflict with this Court's decisions just noted and because the lower court ignored the fundamental lessons both of this Court's agency-shop cases from *Railway Employees Dep't v. Hanson,* 351 U.S. 225 (1965)

through *Ellis v. BRAC,* U.S. , 104 S.Ct. 1883 (1984) and also its due process jurisprudence as stated in *Matthews v. Eldridge,* 424 U.S. 319 (1976) and its progeny. This Court has recognized that "important government interests" are advanced by providing that public employees who obtain the benefits of union representation pay their proportionate share of the costs of representation, as such a requirement "promote[s] peaceful labor relations," *Abood v. Detroit Board of Education,* 431 U.S. 209, 225, 219 (1977), and that those governmental interests justify the resulting impact on First Amendment interests of objecting fee-payers. Yet the court below held that the very collection of the fee implicated plantiffs' First Amendment "liberty" of association and read the Due Process Clause as a rigid straight jacket that imposes on the states the burdensome, time-consuming and expensive obligations of establishing administrative procedures as a condition of enforcing a proportionate-share requirement.

I. THE DECISION BELOW IS DIRECTLY CONTRARY TO TWO RECENT SUMMARY DECISIONS BY THIS COURT

The precise issue that the objecting fee payers tendered to the court below has been raised in this Court twice this Term. In each instance this Court disposed of the issue summarily and in a manner contrary to the position respondents espoused below. The Seventh Circuit's decision sustaining respondents' position thus is directly contrary to two decisions of this Court, each of which issued after the decision below.[7] That decision therefore should be vacated and remanded for reconsideration in light of the Court's recent decisions.

---

[7] Summary decisions by this Court are, of course, adjudications on the merits binding on the lower court. *E.g., Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 344-345 (1975).

1. In *Jibson v. White Cloud Education Association*, this Court dismissed, for want of a substantial federal question, an appeal from the decision of the Michigan Court of Appeals in *White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W. 2d 551 (1980). That case was brought by a union to secure enforcement of an agency-shop clause. The employee who refused to pay the proportionate share fee required by the clause intervened in the case, arguing that he could not constitutionally be compelled to pay any money to the union until after there had been a judicial determination "of the amount . . . not used for ideological activities." 101 Mich. App. at 318, 300 N.W. 2d at 554. The Michigan court of appeals rejected that argument holding that

> the employee's First Amendment rights can be adequately safeguarded *if the disputed fee is paid to the union and the employee immediately files suit for declaratory judgment*. . . . In this manner, while the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights, the union is not cripped by non-access to that portion of the fee which will be used for collective bargaining, contract administration, and grievance adjustment. [101 Mich. App. at 319, 300 N.W.2d at 555 (emphasis added).]

The employee appealed to this Court, and in his jurisdictional statement raised a single question:

> Is a State's public-sector agency-shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's courts licenses the unions—prior to any adjudication of the amount of a constitutionally permissible agency-shop fee—to spend a dissenting employee's compulsory fee for political and ideological purposes unrelated to collective bargaining.

On October 9, 1984, this Court dismissed Jibson's appeal for want of a substantial federal question.

2. In *Kempner v. Dearborn Local 2077*, the identical issue was resolved by this Court in the identical manner. That case began as a proceeding before the Michigan Employment Relations Commission brought on behalf of an employee who objected to paying a proportionate share fee even though, in assessing that fee, the union had reduced its dues by the percentage of its income that the union had determined it expended on political and ideological purposes unrelated to collective bargaining. As in *Jibson*, the employee argued that she could not be required to pay any fee to the union prior to an adjudication of the proper amount of the fee and proposed, instead, that she pay the fee into escrow, thereby denying the union any part of the fee *pendente lite*. The Commission rejected that argument, holding that once the union made a reduction of dues for non-members based on "a good faith application of current case law," the objecting employee "must commence paying [the] reduced fee" while "pursu[ing] other remedies to obtain a final allocation of the fee." The Michigan Court of Appeals affirmed, *Kempner v. Local 2077, AFL-CIO*, 126 Mich. App. 452, 337 N.W. 2d 354 (1983), stating:

> We hold that an escrow remedy unduly restricts "the union's ability to require every employee to contribute to the cost of collective bargaining activities" . . . for, although [the employee] would part with her money, the union would not receive it. The union would nevertheless be obligated to fulfill its ongoing statutory responsibilities to the entire bargaining unit—including the charging party-appellant —without corresponding financial sustenance. [126 Mich. App. at 460-461, 337 N.W. 2d at 358.]

Kempner appealed to this Court, presenting as the first question presented in the jurisdictional statement the following:

> Is a State's public-sector agency shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's administrative agencies and courts, licenses the

union—prior to a governmental adjudication of the amount of a constitutionally permissible agency shop fee—to either (a) spend an objecting employee's compulsory fee for political, ideological and other non-collective bargaining purposes, or (b) secure the discharge of an objecting employee for failing to pay, except into escrow, the disputed fee amount?

On October 29, 1984, this Court dismissed that appeal for lack of a substantial federal question.

3. *Jibson* and *Kempner* necessarily establish that the Constitution permits a state to provide that an objecting employee is to pay a proportionate share fee to the union *before* the amount of the fee is adjudicated by a court or governmental agency so long as the fee does not exceed the amount of union dues reduced by the percentage that the union determines, in good faith, is expended on political and ideological activities unrelated to collective bargaining,[8] and so long as a judicial or an administrative procedure exists for *post*-payment review of the union's determination of the proper reduction.[9] Under

[8] The state court decision in *Kempner* expressly notes that the union was seeking a reduced service fee. 126 Mich. App. at 456. Although the decision in *Jibson* does not so state, this Court was advised before dismissing the appeal that, in fact, the union had made an "advance reduction" of union dues in that case. *See* Appellee's Motion to Dismiss at 6. *See also* Appellant's Br. in Opp. at 3. Thus we understand *Jibson*, like *Kempner*, to permit such a reduction calculated by the union itself. ("In making this computation, the Union must use its own definition of ideological and political as long as that definition is a good faith application of current case law." *Kempner*, 126 Mich. App. at 456.) *See also Ellis v. BRAC*, 104 S.Ct. at 1890 ("advanced reduction and/or interest-bearing escrow accounts" are "acceptable alternatives" to a pure rebate approach, the latter held to violate the Railway Labor Act).

[9] In *Kempner*, the Michigan court held that "an 'objecting nonmember must . . . exhaust the internal appeal procedures provided by [the union] for challenging its allocation of the fee before requesting allocation from the Commission," 126 Mich. App. at 452, 337 N.W. 2d at 359. The constitutionality of this exhaustion requirement

Jibson and *Kempner*, so long as judicial review is available, a state is *not* required to establish an administrative process for determining the proper amount of the fee nor is the state required to make an adjudication before the union is permitted to expend any of the monies collected from an objecting employee.

Nonetheless, the decision below imposes one or both of these requirements upon the CTU and the Chicago School Board; under that decision it is not sufficient that CTU has reduced the proportionate share fee by the percentage of its expenditures (5%) that the Union determined was not expended on the collective bargaining process and contract administration,[10] and it is not even sufficient that all of the (reduced) fee remains in an interest-bearing escrow account pending arbitral or judicial review of the amount of the reduction. Thus, the decision below is in square conflict with *Jibson* and *Kempner*.

That very conflict was acknowledged by the appellant in *Kempner*. In seeking to have this Court note jurisdiction in that

was raised as the second question presented in appellant's jurisdictional statement in *Kempner*; thus, in dismissing that appeal for want of a substantial federal question, this Court necessarily upheld such an exhaustion requirement.

The decision below in the instant case is inconsistent with this aspect of *Kempner* also, for the court below concluded that "an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements." App. A-13. We do not pursue this conflict here because it is of no practical importance in this case: as previously explained, an employee who objects to the amount of the service fee deducted by the Chicago School Board has the option of proceeding directly to state court; if the employee does so, the disputed service fee will remain in escrow *pendente lite*.

[10] The district court below found that "CTU made a thorough analysis of its financial records in good faith compliance with both the statute and its agreement with the Board," with the result that "non-members were required to contribute only a carefully precalculated portion of union dues." App. A-51. Compare the standard in *Kempner*, quoted *supra* in note 8.

case, appellant urged that "[t]he *Hudson* decision [*i.e.*, the decision in the instant case] is particularly important" because "*Hudson* . . . delineates the multiple errors of the Michigan Court of Appeals." Br. In Opp. to Motion to Dismiss at 1, 10. This Court nonetheless dismissed the *Kempner* appeal, thereby endorsing the view of the Michigan court of appeals and not the view of the appellate court in this case.

4. The court below did not have the benefit of *Jibson* and *Kempner* on the date, September 6, 1984, that court rendered its decision. When rehearing was denied, on October 24, 1984, *Kempner* had not yet been decided and *Jibson*, which had been decided less than two weeks earlier, had not yet been called to the attention of the lower court, and was not mentioned in the order denying rehearing.[11]

Immediately after *Kempner* was decided, petitioners requested leave to file a motion for reconsideration of the denial of rehearing; the motion petitioners sought to file was predicated entirely on *Jibson* and *Kempner*. The request for leave to file was denied, thereby precluding any action on the merits of the proposed motion for reconsideration. The court below thus has not confronted the conflict between its decision and this Court's decisions in *Jibson* and *Kempner*. Accordingly, we respectfully suggest that the judgment below be vacated and remanded for reconsideration in light of *Jibson* and *Kempner*.

II. THE DECISION BELOW ERRONEOUSLY CREATES AN ENTIRELY NEW "LIBERTY INTEREST" AND IMPOSES RIGID AND UNWORKABLE PROCEDURAL REQUIREMENTS ON SCHOOL BOARDS.

If this Court were to decide that a remand of this case to the Seventh Circuit for reconsideration is not appropriate, the

[11] Petitioners sent a letter to the Seventh Circuit calling *Jibson* to the court's attention; that letter crossed in the mail with the order denying rehearing.

decision below would warrant plenary consideration. The lower court's decision not only conflicts with this Court's summary decisions in *Jibson* and *Kempner* but also rests on a reading of the First and Fourteenth Amendments that is inconsistent with this Court's precedents and that imposes burdensome, unworkable and unnecessary requirements on school boards and other public employers.

1. The first error of the court below was in finding an expansive—indeed unprecedented—liberty interest. That court believed this Court has "had no occasion to decide whether an agency fee exacted by a public employer deprives the employee of his liberty of association and therefore may not be exacted unless the dissenter is given due process of law." App. A-8. The lower Court proceeded to answer that supposedly open question in the affirmative stating that "forcing a public employee to support a union . . . does deprive him of 'liberty' within the meaning of the Fourteenth Amendment," App. A-6, and explaining that "[t]he liberty in question is freedom of association," App. A-7. According to the court of appeals "even the use of agency fees for contract negotiation and administration is an interference with First Amendment liberty" and "[s]*uch interference is a deprivation of liberty*." App. A-8. Finally, the court below added: "Contrary intimations in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 236-38 (1956) are no longer authoritative." *Id.* The court below is wrong in all respects.

Hanson, *Abood* and *Ellis* all address the very issue the lower court thought to be open and resolve that question in a manner contrary to the decision below. Those cases uniformly hold that the compelling governmental interest in promoting labor peace and eliminating "free riders" justifies any arguable impact on First Amendment interests that may result from providing that employees who do not choose to be union members are to pay agency fees to their exclusive representative to finance their share of the cost of collective bargaining and administering the

agreement. In *Hanson* the Court stated the point this way: "We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." 351 U.S. at 238. In *Abood* the Court reaffirmed that rule:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson and* [*Machinists v.*] *Street* [367 U.S. 740 (1961)] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. [431 U.S. at 222].

And just last Term, in *Ellis*, the Court stated:

> "To be required to help finance the union as a collective bargaining agent might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." It has long been settled that such interferences with First Amendment rights is justified by the governmental interest in industrial peace. At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining." [*Ellis*, 104 S.Ct. at 1896; citations omitted].[12]

These precedents—as well as the decisions in *Street* and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), which interpreted the Railway Labor Act in the light of the First and Fifth Amendments—leave no room for any suggestion that requiring all employees in a bargaining unit to provide financial support for

[12] Significantly, in support of the statement that "[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace," the *Ellis* Court cited *Hanson* and, indeed, cited the very page of *Hanson* which the court below stated was "no longer authoritative."

such activities as "contract negotiation and administration" constitutes a deprivation of liberty. Rather, those decisions teach that no deprivation of associational freedom occurs unless an objector's fee is in fact expended for activities not "germane to collective bargaining" and "involv[ing] the expression of ideas." *Ellis*, 104 S.Ct. at 1896.

The lower court's discussion of the liberty interest issue thus reduces to the proposition that the "liberty" protected by the Due Process Clause is *broader* than the First Amendment freedom of association. This Court has made it plain that the objector's interest in not being required to support any union activities is outweighed by countervailing state interests so that the objector does not have a constitutional right to refuse to support union activities germane to bargaining. Nonetheless, according to the court below, the objector's "liberty" somehow encompasses the associational interest which this Court has held does not rise to the level of a constitutional right.

The court of appeals' rationale collapses of its own weight. As this Court has stated, if an objector's money is used by the union only for permissible purposes, the objector "would have no grievance at all." *Street*, 367 U.S. at 771. Thus, insofar as the decision below rests on its expansive interpretation of the objector's "liberty" under the Due Process Clause, the decision is erroneous and, indeed, contrary to the precedents in this Court.

2.(a) The decision below is also inconsistent with this Court's cases which address the procedural requirements of the Due Process Clause. The Court has held that " '[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). This Court's decisions illustrate the application of this principle in a variety of different contexts.

See, e.g., Matthews v. Eldridge, (termination of disability benefits); *Ingraham v. Wright*, 430 U.S. 651 (1977) (infliction of corporal punishment); *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of drivers license). The decision below completely ignores that fundamental truth.

Under that decision, each and every public employer in Illinois and Wisconsin that agrees to an agency shop provision must, before the employer may deduct proportionate share payments from its employees, assure that an objecting employee has both "a prompt administrative hearing . . . to incorporate the usual safeguards for evidentiary hearings before administrative agencies" and "judicial review of the agency's decision." App. A-13.[13] It is not sufficient, under the decision below, that the state has provided such employees *a right to proceed directly to state court* to raise their objections to the amount of the proportionate share payment before their payments are released to the union for its use: an *administrative* system is apparently required—and thereafter a right to judicial review—before the union has access to at least objectors' fees.

We know of no principle nor any precedent to support this onerous and peculiar requirement. The interest of objectors that this Court has identified as qualifying for constitutional protection is the interest in avoiding "compulsory subsidization,"

[13] Wisconsin, like Illinois, has enacted a statute authorizing local governments to deduct proportionate share payments from the earnings of employees who are represented by but do not belong to an exclusive representative. *See Wis. Stat.* § 111.70(1)(h) (1981-82). The Third state in the Seventh Circuit, Indiana, does not have a similar statute; while school districts in the state have been held to have the inherent authority to include a provision for proportionate share payments in a collective bargaining agreement, it is unclear whether such payments may be deducted from an objector's pay or must be collected only through a union lawsuit against the objector. *See Fort Wayne Education Association v. Goetz*, 443 N.E.2d 364 (Ind. App. 1983).

Abood, 431 U.S. at 237, of at least certain union activities. But such subsidization occurs only when a proportionate share payment is made available to the union for its use, and under Illinois law and CTU's procedures for implementing the proportionate share provision a judicial hearing is available *before* money is released from escrow to the union treasury. Thus, there can be no constitutional objection to the *timing* of the hearing that was available to respondents here.

We cannot conceive of any constitutional infirmity in the fact that the hearing could have been before a state-court judge *ab initio*.[14] It is, after all, the very essence of the judicial function—for state judges no less than for federal judges—to provide fair and impartial hearings that comport with the requirements of due process. Each of this Court's union-shop and agency-shop cases from *Hanson* to *Ellis* was prompted by an objector's complaint in court. Yet the very point of the holding below is that the grant of the opportunity for hearings before state judges is constitutionally insufficient and that Illinois erred in failing to provide an administrative hearing prior to the judicial hearings available under Illinois law. That holding makes no sense. And under it each year, for each proportionate share agreement, objectors will have a right to an initial administrative determination, to be followed by a judicial determination of the amount of the proportionate share payment to which each union is entitled. The administrative process thus mandated will be expensive and time-consuming to operate, and will add nothing to the judicial procedures that already are available to objecting fee payers as a matter of state law.

(b) The problem caused by the court of appeals' approach is exacerbated where the initial administrative determination required by its decision is made by a public employer with

[14] Whether an Illinois state court would have required exhaustion—as did the district court below and the state court in *Kempner*—is uncertain, as no objector used that forum.

respect to the proportionate share payments due to the union which represents that employer's employees—which is precisely what the decision-below contemplates happening in Chicago. By its very nature, collective bargaining and contract administration creates, at least in part, an adversarial relationship: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest.' " *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 394 (1982). Nonetheless, under the appellate court's decision, the public employer, one of the participants in the adversarial process, is to be placed in the position of judge vis-a-vis the union, from time to time its adversary. The employer is indeed commissioned to resolve which of the union's expenditures are properly chargeable to fee payers as part of the union's cost of "collective bargaining" and "contract administration" and which are not—a task to which the employer brings no particular expertise but considerable self-interest.[15]

The danger to constructive labor relations posed by placing the employer in position of judge is self-evident. And there is no need to do so, since the ultimate decision as to the proper amount of the proportionate share payment will still be made by the state court in reviewing the administrative determination.

(c) Even if, contrary to what we have just shown, the procedural requirements that the decision below mandates were not so burdensome and unnecessary, that decision would still be plainly erroneous. For, it is most explicitly *not* the task of the federal judiciary, in adjudicating constitutional challenges

[15] The district court recognized the conflict that would create, stating, "For any employer—public or private—to be placed in a position of exercising a veto over a union's allocations and expenditures would create a serious imbalance in bargaining power." App. A-53, n. 19.

to a hearing procedure established by a State, to assess the wisdom or or lack thereof of a particular state-created procedure or to determine what procedural mechanism is, in the court's view, the ideal. Rather, the only legitimate inquiry for the federal courts in such case is whether the procedure the State has established offends the "flexible" requirements of the Due Process Clause, *see Matthew v. Eldridge, supra;* only when that is true are the federal courts empowered to invalidate the State's procedures. And even if, *arguendo*, the mixed administrative-judicial process the court of appeals has mandated here were somehow superior to the judicial process available in Illinois to objecting fee payers, the fact remains that the Illinois process satisfies every conceivable requirement of the Due Process Clause. Accordingly, the court of appeals erred in holding the existing system unconstitutional and in mandating an administrative hearing system as a precondition to collecting proportionate share payments.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. JACOBS
CHARLES ORLOVE (Counsel of Record)
NANCY E. TRIPP
JACOBS, BURNS, SUGARMAN & ORLOVE
201 North Wells St., Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646
LAWRENCE A. POLTROCK
WAYNE B. GIAMPIETRO
DE JONG, POLTROCK & GIAMPIETRO
221 N. LaSalle St., Suite 2600
Chicago, Illinois 60601
Attorneys for Petitioners